# Ng Kheng Yong @ Ng Tet Lai v Seng Hup Realty Co Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS A02–545 & A02 OF 1999

ABDUL HAMID MOHAMAD FCJ, MOHD GHAZALI MOHD YUSOFF JCA AND FAIZA THAMBY CHIK J

30 APRIL 2004

*Contract — Frustration — Change in circumstances — Sale and purchase of land — Fulfilment of contract subject to obtaining approval for conversion and subdivision of land — Change in Government policy — Whether fundamentally altered obligations under contract — Whether all reasonable endeavours exhausted to obtain approval*

The plaintiff (appellant) entered into a sale and purchase agreement with the defendant (respondent) over two lots of land, ie Lot 1557 and Lot 129. One of the terms of the agreement was for the appellant to apply to the Pengarah Tanah Galian ('PTG') for conversion and subdivision of the land. The appellant filed a suit ('the suit') that the agreement be terminated. That action and the appeal concerning the same were dismissed. Pursuant to an application filed by the respondent in the suit, the appellant was ordered by the High Court to apply for the conversion and subdivision of the land. The appellant's application for conversion and subdivision was rejected. Efforts were then made by the respondent to apply for the conversion and subdivision but such efforts were also in vain. The appellant then filed an originating summons in the High Court seeking for an order that the agreement was frustrated. The issue for consideration was whether the agreement was frustrated when the application for conversion and subdivision was rejected by the PTG.

**Held**, allowing the appeal:

(1) Evidence proved that the appellant had used all reasonable endeavours to obtain separate titles to the individual lots. The introduction of the Master Layout Plan for the area by the Town Planning Authority, being tantamount to a change in Government policy, is a ground of discharge as it introduced new and unexpected conditions and restrictions which affected the original layout plan annexed to the agreement. Ordering the appellant to agree to a new layout plan as submitted by the respondent is tantamount to rewriting the agreement (see paras 39 and 42).

(2) The parties entered into the agreement which had depended upon a possible approval for conversion and subdivision to be forthcoming from the PTG based upon the original layout plan. The application was rejected. Upon that happening, the agreement has to be regarded as dissolved by reason of circumstances beyond the control of the parties. The foundation upon what the parties have deemed to have had in contemplation had dissipated when the application for conversion and subdivision was rejected. This would be a ground on which to rest the doctrine of frustration (see para 43).

**[Bahasa Malaysia summary**

Plaintif (perayu) telah memasuki satu perjanjian jualbeli dengan defendan (responden) untuk sebidang tanah. Salah satu daripada terma perjanjian adalah untuk perayu memohon kepada Pengarah Tanah Galian ('PTG') satu penukaran dan pembahagian tanah tersebut. Perayu telah memfailkan satu guaman ('guaman tersebut') agar perjanjian dibatalkan. Tindakan tersebut dan rayuan berkaitan yang sama telah ditolak. Berikutan satu permohonan yang telah difailkan oleh responden dalam guaman tersebut, perayu telah diperintahkan oleh Mahkamah Tinggi untuk memohon penukaran dan pembahagian tanah tersebut. Permohonan perayu untuk penukaran dan pembahagian itu telah ditolak. Usaha-usaha seterusnya telah dilakukan oleh responden untuk memohon penukaran dan pembahagian tersebut tetapi segala usaha berikut juga gagal. Perayu kemudiannya telah memfailkan satu saman pemula di Mahkamah Tinggi memohon satu perintah agar perjanjian tersebut dikecewakan. Persoalan untuk dipertimbangkan adalah sama ada perjanjian tersebut telah dikecewakan apabila permohonan untuk pertukaran dan pembahagian tersebut ditolak oleh PTG.

**Diputuskan**, membenarkan rayuan tersebut:

(1) Bukti menunjukkan bahawa perayu dengan munasabahnya telah menggunakan segala usaha untuk mendapatkan hakmilik berasingan untuk lot berasingan tersebut. Pengenalan Pelan Rekaletak Asal untuk kawasan daripada Pihak Berkuasa Perancangan Bandar, merupakan suatu penukaran dalam polisi kerajaan, adalah alasan untuk pelepasan kerana ia memperkenalkan syarat-syarat dan penyekatan yang baru dan tidak disangka yang mempengaruhi pelan rekaletak asal yang disertakan kepada perjanjian. Memerintahkan perayu untuk bersetuju kepada pelan rekaletak baru yang diberikan oleh responden membawa maksud menulis-semula perjanjian (lihat perenggan 39 dan 42).

(2) Pihak-pihak telah memasuki perjanjian yang bergantung kepada kemungkinan satu kelulusan untuk penukaran dan pembahagian daripada PTG berdasarkan pelan rekaletak asal. Permohonan tersebut telah ditolak. Berikutan itu, perjanjian tersebut hendaklah dianggap telah ditamatkan oleh sebab keadaan yang tidak dapat dikawal oleh pihak-pihak berikut. Asas terhadap apa yang pihak-pihak jangkakan telah dibazirkan apabila permohonan untuk penukaran dan pembahagian telah ditolak. Ini merupakan alasan yang mana berasaskan doktrin kekecewaan (lihat perenggan 43).]

**Notes**

For cases on change in circumstances, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 3297-3298

**Cases referred to**

*National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 (refd)

A *Shell Malaysia Trading Sdn Bhd v Lim Yee Teck & Ors* [1982] 2 MLJ 18 (refd)
*Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 MLJ 699 (refd)

**Legislation referred to**

B National Land Code s 124

*Mah Weng Kwai (Quah Soon Wai and NS Guok with him) (YL Seow & Quah) for the appellant.*
*PS Gill (HS Pannu with him) (Gill & Tang) for the respondents.*

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**Mohd Ghazali Mohd Yusoff JCA** (delivering judgment of the court):

BACKGROUND

D **[1]** On 12 November 1971, the appellant (the plaintiff in the court below) as vendor entered into a sale and purchase agreement ('the agreement') over two pieces of land with one Teo Bak Sang as purchaser ('the purchaser'). The first piece of land measuring 36 acres was known as Geran No 13267, Lot 1557, Mukim Asam Kumbang, Daerah Larut dan Matang, Perak. The second piece of land measuring 16 acres 0 roods and 15 poles was known as Sijil Hakmilik 1113, Lot 129 (now known as Geran No 9318) ('Lot 129'). E The subject of the dispute revolves around Lot 129 only. The terms of the agreement included the following:

(a) that the appellant shall sell the two pieces of land to the purchaser as separate and complete building lots at a price of RM1,700 per lot in four phases of which 114 building lots are in Lot 129 (cl 4);

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(b) that eight completed building lots (of which 2 building lots are in Lot129) and the building lots which are outside the boundaries of the two pieces of land shall be excluded from the sale and remain the property of the appellant (cl 6);

G (c) that the remaining areas of the two pieces of land, shown unshaded on the plan annexed to the agreement and designated as road reserve areas and areas reserved for public purpose, may be surrendered to the State Government by the appellant if required to do so in the course of subdivision (cl 7);

H (d) that the appellant shall be responsible for obtaining the conversion and subdivision of the two pieces of land (cl 9); cl 9 reads:

> The purchase price for the building lots is on the basis of the issue of separate titles (qualified or final) for each lot, subject to the category 'building' as defined in the National Land Code. Accordingly the vendor shall be *solely responsible* for obtaining the conversion and subdivision of the large and small lots at his own expense, and I shall use all reasonable endeavours to obtain separate titles to the individual building lots with the minimum of delay: provided that
>
> (a) ... ;

(b) ... ;

(c) The vendor shall at his own costs and expenses employ a surveyor for the purpose of carrying out the necessary preparatory work for the issue of separate titles and to pay the reasonable expenses and fees of such surveyor. ... ;

(e) that no variation of the approved layout plan (hereafter referred to as 'the original layout plan') shall be permitted except with the written approval of both parties (cl 23); cl 23 reads:

'The vendor shall be entitled to apply to the State Government and Municipal authorities for permission to further subdivided the areas designated as areas reserved for public purposes on the approved lay out plan, and for permission to include thereon additional building lots, and in the event that the same is approved, the vendor shall sell and the developer shall purchase such additional building lots as part of Phase 'D' at the aforesaid price of Dollars One thousand seven hundred ($1,700) per lot. Save as aforesaid, no variation of the approved layout plan shall be permitted except with the written approval of both parties hereto.'

**[2]** On 4 December 1972, the purchaser assigned all his rights and interests in the agreement to the respondent (the defendant in the court below).

**[3]** In 1973, the appellant filed a suit at the Ipoh High Court, namely, Civil Suit No 362–1973 ('the 1973 suit') against the respondent for a declaration that the agreement be terminated on the grounds that the respondent:

(a) failed to construct an 'approach road' as provided for in the agreement; and

(b) failed to pay the appellant RM6,840 which is apportioned payment in excess of RM13,350 for the surveyor employed by the appellant.

**[4]** The 1973 suit was dismissed by the High Court on 17 September 1985. On 26 March 1986, the appellant's appeal to the then Supreme court was also dismissed.

**[5]** On 7 March 1988, pursuant to an application filed by the respondent in the 1973 suit, the High Court ordered the appellant to proceed to apply for the conversion and subdivision of Lot 129.

**[6]** On 7 June 1988, the appellant submitted the application for conversion and subdivision of Lot 129 to the Pejabat Pengarah Tanah dan Galian, Perak ('PTG') through his agent, Sow Tung Low, a surveyor. Theapplication was rejected on 5 February 1990. The appellant appealed to the PTG on 6 April 1990 but the appeal was rejected on 5 October 1990. On 4 November 1991, the appellant appealed to the Menteri Besar, Perak but the appeal was rejected on 18 February 1992.

**[7]** On 14 December 1993, the respondent, through a company named Bukit Jana Resort Sdn Bhd, applied to the land office for conversion and subdivision of Lot 129 but that application was also rejected.

**[8]** On 5 June 1995, the appellant filed an originating summons in the Taiping High Court, namely, OS No 135–95 seeking for an order that the sale of lot 129 in the agreement was frustrated and for vacant possession.

**[9]** On 22 May 1997, the respondent filed a summons-in chambers (encl132) in the 1973 suit praying for several orders including the following:

(a) that the appellant, within 14 days from the date of the order do sign the application for the conversion of all the land in Lot 129 as prepared by the respondent and do forthwith give to the respondent for submission to the appropriate authorities;

(b) that in the event the appellant fails to comply with (a) above, then the senior assistant registrar, High Court be empowered to sign and do sign the application for and on behalf of the appellant within seven days on being requested to do so by the respondent;

(c) that the appellant do submit an application as prepared by the respondent for Lot 129 to the relevant authorities for subdivision of into building lots within seven days;

(d) that in the event the appellant fails to comply with (c) above, then the senior assistant registrar, High Court be empowered to sign and do sign the application for and on behalf of the appellant within seven days on being requested to do so by the respondent;

(e) that the appellant do deposit the title to Lot 129 with the respondent's solicitors as stakeholders who shall be empowered to surrender the title to the authorities upon approval of the conversion and subdivision;

(f) that the appellant do execute memorandum of transfers in respect of the building lots comprised in Lot 129 in favour of the respondent save and except for two lots which is the appellant's entitlement pursuant to the said agreement and deposit the same with the respondent's solicitors within seven days on being requested to do so by the respondent;

(g) that in the event the appellant fails to comply with (f) above, then the senior assistant registrar, High Court be empowered to sign and do sign the memorandum of transfers on behalf of the appellant within seven days on being requested to do so by the respondent;

(h) that in any event the appellant do pay the cost of the conversion of Lot129 up to the amount of RM8,000 per acre in accordance with the said agreement; and

(i) that in any event the appellant bear all cost and expenses incurred by the respondent for the purpose of carrying out the necessary preparatory works for the subdivision of Lot 129 and the issuance of individual titles of Lot 129 and to pay the reasonable expenses of the surveyor employed by the respondent.

**[10]** Originating Summons No 135–95 was later transferred to the Ipoh High Court and re-numbered as OS No 24–523–97. The plaintiff and defendant consequently agreed that encl 132 of the 1973 suit and OS No 24–523–97 be heard together before the learned High Court judge, Ipoh. The parties also agreed that the decision on encl 132 of the 1973 suit would be binding on OS No 24–523–97.

**[11]** On 25 June 1999, the learned judge of the High Court, Ipoh ('the learned trial judge') dismissed OS No 24–523–97, *viz*, he dismissed the appellant's application for an order that the sale of Lot 129 was frustrated and an order for vacant possession and granted the orders prayed for by the respondent in encl 132 of the 1973 suit and hence, these appeals. The first appeal before us, *viz*, Rayuan Sivil No A02–545–99 relates to OS No 24–523–97 and Rayuan Sivil No A02–546–99 relates to encl 132 of the 1973 suit.

THE DECISION OF THE LEARNED TRIAL JUDGE

**[12]** Before the learned trial judge, the appellant contended that on his part, he had taken all the necessary steps to obtain the necessary conversion and subdivision of Lot 129 with no success. Notwithstanding all his efforts, the agreement cannot be completed and therefore the same is frustrated. Insupport of that contention, the appellant's counsel referred to *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211.

**[13]** In that case, the plaintiff was the registered owner of a piece of land together with a building erected thereon known as 'Sharidal Complex' ('the said property'). By agreement dated 19 September 1980, the plaintiff agreed to sell and the defendant agreed to purchase the said property at the price of RM8.5m of which a sum of RM850,000 was paid at the time of the execution of the agreement. It was agreed that the defendant shall make an application to the Foreign Investment Committee ('FIC') for approval of the sale and purchase. The FIC refused its approval; the FIC's letter dated 30April 1981 reads:

> I am directed to inform you that the FIC is not agreeable to the transaction to proceed as proposed. However, the FIC has no objection to the purchase of Sharidal Complex by National Land Finance Co-operative Society Ltd from Sharidal Sdn Bhd being undertaken on condition National Land Finance Co-operative Society Ltd incorporates a joint-venture company with Bumiputra holding at least 30% of the company's equity to own the property, and NLFC obtaining the approval of the Director-General of Co-operative Development.

**[14]** The plaintiff then filed an originating summons seeking for, *inter alia*, a declaration that the agreement became void on 30 April 1981, ie the date when the FIC did not give its approval to the sale. The defendant maintained that the agreement did not become void but still subsisted because there was a conditional approval. The High Court held that the agreement became void. On appeal, the Federal court affirmed the decision of the High Court. The Federal court held that the agreement became void on 30 April 1981 because of the refusal of the FIC to approve the deal over which neither the appellant (defendant) and the respondent (plaintiff) have control.

**[15]** Before the learned trial judge in the instant cases, the appellant's counsel had also referred to p 213 of the decision of the High Court in the above case cited where the learned judge said:

> As to item (d), even if the defendant succeeded in showing that the plaintiff was all along not keen to get the sale and purchase completed, similarly I do not see how the alleged lack of enthusiasm on the part of the plaintiff could in any way affect

A the decision of the FIC which, as already pointed out, was based on its policy. The true deciding factor in this case was the FIC's decision, whether its decision was in the form of rejection or conditional approval, and in the event of a conditional approval the other deciding factor was the defendant's ability or inability to comply with the FIC's condition within the time limit. Even if the alleged lack of keenness on the part of the plaintiff was true, the defendant has not given any indication how the lack of keenness on the part of the plaintiff can affect the defendant's ability or inability to comply with the condition and to complete the purchase in due time.

**[16]** The respondent had argued that pursuant to cl 9 of the agreement, it was incumbent on the appellant as vendor to be solely responsible for obtaining conversion and subdivision of the two pieces of land at his own expense. The respondent contended the rejection for conversion of Lot 129 was primarily due to:

(a) failure by the appellant to take any and/or proper or reasonable steps to follow up with the application for conversion;

(b) failure by the appellant to provide information required by the relevant authorities;

(c) failure by the appellant to attend the land office to pursue the matter.

**[17]** Before the learned trial judge, the respondent also averred that the appellant had all along since 1973 intended to try and terminate the agreement under some pretext. The appellant had already sold and the respondent had already paid in full for the subdivided lots in Lot 129 as agreed. The appellant having undertaken to deliver the subdivided lot titles cannot now, by subterfuge, avoid his obligations and should be compelled by a court order to submit a fresh application for conversion. Lot 129 had not ceased to exist and there had been no fundamental or radical change in the obligation originally undertaken to make the performance of the agreement radically different from that originally planned.

**[18]** In his grounds of decision, the learned trial judge said 'the issue before me is to determine upon a proper construction of cl 9, and in judging the plaintiff's conduct, hitherto, whether he had used all reasonable endeavours to obtain separate titles for lot 129.' The learned trial judge was of the view that the word 'obtain' found in cl 9 of the agreement, *viz*, 'the Vendor shall be *solely responsible* for *obtaining* the conversion and subdivision of the large and small lots at his own expense, and shall use all reasonable endeavours to *obtain* separate titles to the individual building lots with the minimum of delay' denotes that 'it is thus obligatory on the part of the plaintiff to use all reasonable endeavours to obtain separate titles'.

**[19]** The learned trial judge noted that at the trial, the appellant admitted that after receiving the Menteri Besar's letter dated 18 February 1992 he had not made any further approaches or overtures in respect of Lot 129 as he felt that it was futile. In relation to the testimony of the appellant, the learned trial judge made the following observation:

This witness in cross examination stated that he had no desire presently, to make a fresh application for conversion as he felt that [the] matter had dragged on for

far too long. Having said that, he candidly admitted that, if he was offered a better value for the land, as the land value had gone up since, he would be prepared to consider filing for conversion of the land. I found this piece of evidence disquieting to say the least, and shall elaborate on it in the latter part of my judgment.

Needless to say, the defendant's counsel seized on this candid remark of the plaintiff and in submission stated that the attitude of the plaintiff, his dilatoriness, and lack of interest, was due to the fact that the land prices had appreciated and he was not prepared at this point to honour his previous obligations to the defendants. By his lack of enthusiasm in pursuing the application for conversion with dexterity, he had hoped the defendants would capitulate and opt out of the agreement. When this did not materialize, the plaintiff then decided to terminate the agreement not once, but twice.

**[20]** The learned trial judge then went on to say that counsel for the appellant had also argued that even if one is to accept a certain amount of lethargy or lack of enthusiasm on the part of the appellant, there was nothing here to suggest that the appellant's conduct would have affected the PTG's stand on the application and his subsequent rejection of the appeal. In relation to this argument, the learned trial judge said:

I disagree to this proposition simply because to my mind it is slightly presumptuous to say so at this stage, without the benefit of perhaps a witness from the Land Office, to vouch for the fact that the plaintiff had done all that was conceivable for him to have done, and that the decision of the Land Office would have remained the same. There was nothing to suggest unlike the FIC decision in *National Land Finance Co-Operative Society* that the said decision of the land office was a policy decision. This argument to my mind is flawed at inception.

**[21]** The learned trial judge went on to find that the appellant 'has not used all reasonable endeavours to obtain the conversion of the said land'. He said:

Judging from his own admission, he was only prepared to make a fresh application for conversion, if he was offered a better value/price for the land. It is my considered view that the plaintiff's underlying disinterest in the said conversion, boiled down to increased monetary value of the said land, since the agreement was signed.

His conduct in not pursuing the application for conversion with the land office more diligently, and leaving it to his surveyor, who also said, that generally land owners do make inquiries with the land office to check on their applications and perhaps assist, if any inquiries, are to be made, shows a general apathy towards the whole application process which I firmly believe, is rooted on the fact that the value of the land has increased, since the initial agreement was signed in 1971, and he felt he was being short-changed. This is of course unacceptable in a court of law, as the obligations in an agreement must be upheld — *Faber Merlin (M) Sdn Bhd & Ors v Lye Thai Sang & Anor* [1985] 2 MLJ 381 (SC).

**[22]** In granting an order in terms of encl 132 of the 1973 suit and in dismissing the appellant's claim in OS No 24–523–97, the learned trial judge said:

... it would be ... unconscionable for the present plaintiff to profit from his own breach. The common and paramount intention of parties who buy and sell land, should be given effect to the contract at the price it was bargained for. Parties who

A have signed a written agreement, must be made to carry out their part of the bargain to ensure that the express provisions are given full force and effect, and should not be allowed to renege from their contractual terms.

**[23]** Before the hearing of these appeals proper, the appellant applied by way of notice of motion that he be granted leave to adduce further evidence as set out in his affidavit. As there were no objections from the respondent, we allowed the application. The appellant pointed out the further evidence was only available after 17 January 2003 and was not available during the trial. In his affidavit the appellant referred to this further evidence which consisted, *inter alia*, of the following orders made by the learned trial judge on 25 June 1999, *viz*:

C (c) that the appellant do submit an application as prepared by the respondent for Lot 129 to the relevant authorities for subdivision of into building lots within seven days;

(f) that the appellant do execute memorandum of transfers in respect of the building lots comprised in Lot 129 in favour of the respondent save and except for two lots which is the appellant's entitlement pursuant to the agreement and deposit the same with the respondent's solicitors within seven days on being requested to do so by the respondent.

**[24]** In his affidavit, the appellant stated that under the agreement and the original layout plan annexed to the said agreement, he was entitled to the following building lots in Lot 129, namely:

(a) two bungalow lots;

(b) all the part lots; and

(c) all open spaces which are not required by the State Government.

**[25]** In accordance with the order of the court dated 25 June 1999 he signed an application for conversion and subdivision of Lot 129 in August 1999. On 11 September 2000, the Executive Council of the State of Perak ('EXCO') allowed the conversion of lot 129 in principle subject to the following conditions:

G (a) at least 20% of the terrace houses built must be low-cost houses sold at the price not exceeding RM35,000 per unit;

(b) at least 20% of the medium-cost houses built must sold at the price not exceeding RM53,000 per unit;

(c) at least 30% of the buildings must be sold to bumiputras with a discount of not less than 5%; and

(d) shop-houses that are sold to bumiputras must be sold at the price not exceeding RM100,000 per unit.

**[26]** Pursuant to the approval of the EXCO, the respondent's solicitors had on 6 November 2000 forwarded to his solicitors three copies of the topography plan and 18 copies of the site-plan and requested that he affix his signature to the plans. His solicitors reply to that request reads, inter alia, as follows:

Firstly, we wish to put on record our client's willingness to sign the plans provided that they are in compliance with the Agreement for Sale of Separate and Subdivided Building Lots ('the Agreement'). A

On our perusal of the layout plans, we however note a vast discrepancy between your plans and the plans annexed within the Agreement whereby certain units (including empty plot and part units) have been promised to our client within the Agreement. B

We note that you have requested that we return the documents duly signed on the 8 November 2000 because of the your dateline on 11 November 2000. We understand the urgency of this matter and would assist you in expediting this matter. In such case, we would be obliged if you could clarify the above discrepancy as soon as possible in order for us to advise our client to sign the plans. C

In the meantime, we wish to reiterate our client's willingness to sign the documents. In the event however you wish to proceed before the senior assistant registrar to execute the documents, kindly inform us accordingly as we have been instructed to be present in order to ensure that the documents submitted are correct and in accordance with the Agreement. D

**[27]** The appellant stated that the site plans forwarded by the respondent's solicitors varied substantially from the original layout plan annexed to the agreement in that:

(a) his two bungalow units had been relocated to be adjacent to medium-cost town houses; E

(b) he was not entitled to any open spaces not required by the State Government.

**[28]** Further, the site plans had been varied to include 315 building lots comprising of shop lots, bungalow lots, terrace houses and town houses. Under the original layout plan annexed to the agreement, only 114 building lots comprising of terrace houses and bungalow lots were agreed to by the parties. F

**[29]** He then stated that by letter dated 7 November 2000, the respondent's solicitors replied that the change in the site plans was to comply with the Master Layout Plan for the area by the Town Planning Authority, but they failed to address the issue as to why the original layout plan as annexed to the agreement was not resubmitted to the Town Planning Authority. That letter, *inter alia*, reads: G

With reference to the change of the Layout Plan the same conforms with the Master Plan Layout for the area at the Town Planning and is subsequent to approval of the final 'PU Pelan'. H

We have confirmed with our clients that your client's entitlement will be as follows:

(a) The two units of bungalow lots on the Legend. (The last item under Perumahan as per Legend).

(b) The Terrace Houses 3 (Partial Lots) being the second last item in the Legend headed Perumahan. I

(c) Terrace Houses 2 (Partial Lots) being the 6$^{th}$ item from the top under Legend headed Perumahan.

A For ease of reference we enclose herewith the Legend showing your client's entitlement and also the layout plan showing the locations on the plan.

Accordingly kindly request your client to sign the Layout Plan and forward the same to us immediately.

B **[30]** The appellant then stated that he informed his solicitors that he would not sign the site plans as forwarded by the respondent's solicitors as they differ from the original layout plan annexed to the agreement and consequently requested that copies of the original layout plan be submitted by the respondent. However, on 19 January 2001, the respondent's solicitors requested the senior assistant registrar, High Court, Ipoh to sign the site plans which he had refused to sign. The senior assistant registrar signed the site plans subject to C the respondent's undertaking not to build on Lot 129 for a period of four months or until the appellant's application for the setting aside of the site plans and for submission of the site plan annexed to the agreement have been heard and disposed off by the High Court, Ipoh.

D **[31]** On 21 March 2001, the appellant filed an application vide the 1973 suit for the cancellation and setting aside of the disputed site plans and for the submission of the original layout plan annexed to the said agreement. The hearing of the application was fixed for hearing on 11 June 2003 before the learned judge. In the meantime, the respondent's solicitors informed him that the disputed site plans have been approved.

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THE DECISION OF THIS COURT

**[32]** As discussed earlier, on 7 March 1988, pursuant to an application filed by the respondent in the 1973 suit, the High Court ordered the appellant to proceed to apply for the conversion and subdivision of Lot 129. The following F is not disputed:

(a) on 7 June 1988, the appellant submitted the application for conversion and subdivision of Lot 129 to the PTG, Perak through his agent, Sow Tung Low, a surveyor;

(b) the application was rejected on 5 February 1990;

G (c) the appellant appealed to the PTG on 6 April 1990 but the appeal was rejected on 5 October 1990;

(d) on 4 November 1991, the appellant appealed to the Menteri Besar, Perak but the appeal was rejected on 18 February 1992.

H **[33]** From the above, what is clear is that the issue for determination by the learned trial judge in OS No 24–523–97 was whether the agreement was frustrated when the application for conversion and subdivision of Lot 129 was rejected by the PTG on 5 February 1990 or for that matter on 5October 1990 when his appeal was rejected by the PTG or even on 18February 1992 when his appeal to the Menteri Besar was rejected. The learned trial judge I however was of the view that the issue before him was 'to determine upon a proper construction of cl 9, and in judging the plaintiff's conduct, hitherto, whether he had used all reasonable endeavours to obtain separate titles for

Lot 129.' He concluded that pursuant to cl 9 of the agreement it was 'obligatory on the part of the plaintiff to use all reasonable endeavours to obtain separate titles'. We would agree with his view on this point. But then, the facts did show that the appellant had carried out what was obligatory on his part, viz., he submitted the application for the conversion and subdivision of Lot 129 on 7 June 1988 but that application was rejected on 5 February 1990. He even appealed against that rejection on 6 April 1990 but that appeal was rejected on 5 October 1990. About a month later, he appealed to the Menteri Besar, Perak but that appeal was also rejected.

**[34]** In relation to this, the appellant testified, which was noted by the learned trial judge in his grounds of decision, that he did not pursue the matter further as he felt that it was futile. The learned trial judge however seemed to be of the view that the appellant should at all costs make further attempts to obtain the necessary approval for the conversion and subdivision of Lot 129. With regards to *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd*, the learned trial judge was of the view that the FIC decision was a policy decision and that in the instant cases, there was nothing to suggest that the decision of the 'land office' was a policy decision. He did not however go further to explain what is tantamount to a policy decision.

**[35]** Clause 9 of the agreement states that the appellant shall be solely responsible for obtaining the conversion and subdivision of the land in question. Section 124 of the National Land Code ('the Code') provides that the proprietor of any alienated land may apply to the State Authority for, *inter alia*, the alteration of any category of land use to which the land is for the time being subject. Under the Code the 'State Authority' means the Ruler or Governor of the State. Section 135 of the Code provides the proprietor of any alienated land held under Registry or Land Office title *may*, with the approval of the State Director of Lands and Mines ('PTG') in the case of Land office titles or the Land Administrator in the case of Land Office titles, subdivide the land into two or more portions to be held under separate titles. Section 136(1)(c)(ii) of the Code provides no sub-division shall be approved unless it has been satisfied that the sub-division would not be contrary to any plan approved by the State Authority for the development of the area in which the land is situated or to any decision of any planning authority for that area.

**[36]** In the instant cases, we do not have the benefit of the reason why the appellant's application to the PTG, and consequently his appeal, was rejected. Be that as it may, what is clear from the provisions of the Code is that the State Authority or the PTG or the Land Administrator, as the case may be, has a discretion whether to approve any application for conversion and/or subdivision of any land. Section 136 of the Code provides the conditions that have to be satisfied before approval for subdivision can be given. It is for the State Authority or the PTG or the Land Administrator, as the case may be, to approve or reject any such application. The approval is not as of right and is discretionary.

**[37]** Clause 23 of the agreement provides no variation of the approved layout plan, ie, the original layout plan shall be permitted except with the written approval of both parties. From our reading, the original layout plan annexed to the agreement formed an integral part of the agreement and cannot be severed. That layout plan can only be varied with the consent of the parties. We have perused through the agreement and found nothing therein to provide for the eventuality of that layout plan being varied by the State Authority or the PTG or the Land Administrator, as the case may be, to conform, for example, with any master plan that may have been approved by the State Authority for the development of the area in which Lot 129 is situated or to any decision of any planning authority for that area.

**[38]** The learned trial judge noted that at the trial the appellant admitted he made no further approaches or overtures after receiving the Menteri Besar's letter dated 18 February 1992. He was also of the view that it was 'slightly presumptuous' on the part of learned counsel for the appellant to argue that there was nothing to suggest that the appellant's conduct as averred which he found showed 'a general apathy towards the whole application process' would have affected the PTG's stand on the application and his subsequent rejection of the appeal without the benefit of perhaps a witness from the land office. We do not think that the omission on the part of the appellant to call such a witness have any bearing upon these instant cases before the learned trial judge. What is clear is that both parties have agreed that no variation of the approved layout plan annexed to the agreement, ie, the original layout plan shall be permitted except with the written approval of both parties. The appellant submitted the application for conversion and subdivision together with the original layout plan which the parties had agreed to and that application was rejected. We would think that that would be the end of the matter. A different layout plan, if that was the factor or reason for the rejection of the application, would require the written approval of both parties. That was of course not the situation before the learned trial judge.

**[39]** It is not disputed that pursuant to his appeal with regards to the 1973 suit being dismissed by the then Supreme court on 26 March 1986 and pursuant to the High court order on 7 March 1988, the appellant proceeded to apply for the conversion and subdivision of Lot 129. This inordinate delay on his part in forwarding the application to the PTG would of course reflect badly on his conduct but be that as it may, he did make the application, based on the original layout plan but that application was rejected. We cannot see how the appellant's conduct, namely, his general apathy towards the whole application process as described by the learned trial judge could in any way affect the decision of the PTG. The PTG has a discretion in approving the application. He had rejected the application for reasons best known to him. The appellant's appeal to the PTG to reconsider the application was rejected. We are of the view that these facts showed that the appellant had 'used all reasonable endeavours to obtain separate titles to the individual building lots'. The learned trial judge however was of the view that the appellant's conduct in not pursuing the application with the land office more diligently and leaving everything to his surveyor 'a general apathy' towards the whole

application process. In dismissing the appellant's application in OS No 24–523–97 for an order that the sale of Lot 129 in the agreement was frustrated, the learned trial judge said that parties to an agreement 'should not be allowed to renege from their contractual terms'. In other words, the learned judge found the agreement was not frustrated.

**[40]** In *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 MLJ 699, Gopal Sri Ram JCA said (at pp 709–710):

> The law of frustration is contained in s 57(2) of the Contracts Act 1950 which read:
>
> 'A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.'
>
> The section postulates two supervening events that frustrates a contract. The first is an event that makes the contract impossible of performance: the second is the event of supervening illegality.
>
> In *Ocean Tramp Tankers v V/O Sovfracht* [1964] 1 All ER 161 (CA), LordDenning MR explained the operation of the doctrine. He said (at p 166):
>
> 'It has frequently been said that the doctrine of frustration only applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated', as if that werean essential feature. But it is not so. It is not so much that it is 'unexpected', but rather that the parties have made no provision for it in their contract. The point about it, however, is that: If the parties did not foresee anything of that kind happening, you can readily infer that they have made no provision for it. Whereas, if they did foresee it, you would expect them to make provision for it. But cases have occurred where the parties have foreseen the danger ahead, and yet make no provision for it in the contract. Such was the case in the Spanish civil war when a ship was let on charter to the Republican Government. The purpose was to evacuate refugees. The parties foresaw that she might be seized by the Nationalists. But they made no provision for it in their contract. Yet, when she was seized, the contract was frustrated: see *WJTatem Ltd v Gamboa* [1938] 3 All ER 135. So, here, the parties foresaw that the canal might become impassable. It was the very thing that they feared. But they made no provision for it. So the doctrine may still apply, if it be a proper case for it.
>
> We are thus left with the simple test that a situation must arise which renders performance of the contract 'a thing radically different from that which was undertaken by the contract': see *Davis Contractors Ltd v Fareham UDC* [1956] 2 All ER 145 at p 160; [1956] AC 696 at p 729, per Lord Radcliffe. To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the old situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about he frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound. It is often more difficult to draw the line. But it must be done, and it is for the courts to do it as a matter of law: see *Tsakiroglou & Co Ltd v Noblee & Thord GmbH* ([1961] 2 All ER 179 at p 185–187; [1962] AC 93 at pp 116, 119), per Viscount Simonds and per Lord Reid.'

**[41]** In *Shell Malaysia Trading Sdn Bhd v Lim Yee Teck & Ors* [1982] 2 MLJ 18, the appellant agreed to sell to the respondents a portion of their land in Kuala Lumpur. At the time of the execution of the agreement, the appellants had already applied for the development of a petrol-filling and service station on the land. Prior to the agreement the appellants had already applied for subdivision of the land. The intention of the appellant was to obtain a title in continuation in respect of the portion of land where they wished to construct the petrol station. The Pemungut Hasil Tanah informed the appellant that their application would be considered only if they surrender the portion of the land provided for the petrol station and service station in exchange for a lease of 30 years. The appellant wrote to the Pemungut Hasil Tanah requesting for re-consideration so that two separate titles in continuation could be issued in respect of the two portions of the land. The Pemungut Hasil Tanah replied that their request for title in continuation of the said petrol station site could not be considered as it was against the policy of the Government. The appellant informed the respondents about their inability to obtain separate titles in continuation. Since it was not legally possible to subdivide the land in accordance with the agreement they hereby returned the 10% earnest money paid by the respondents and in the circumstances considered the agreement to have become null and void. The respondents filed a writ claiming for specific performance, damages for breach of agreement and costs. On appeal, the Federal Court held that the appellant had done all they could reasonably be expected of them in pursuing their application for subdivision and when their application was not approved, they were entitled to treat the agreement as having come to an end.

**[42]** The further evidence introduced at these appeals before us clearly showed the PTG will only approve the conversion and subdivision of Lot129 subject to certain conditions which are inconsistent with the terms of the agreement. There was to a certain extent a change in policy on the part of the authorities and this can be gleaned from the explanation forwarded by the respondent's solicitors in their letter to the appellant dated 7 November 2000 wherein in the former explained 'the change in the layout plan' annexed to the agreement was to conform 'with the Master Plan Layout for the area at the Town Planning and is subsequent to approval of the final 'PU Pelan''. What is clear is that the parties did not foresee this when they entered into the agreement, *viz*., they did not make such a provision for this in the agreement. In our view, the introduction of the Master Layout Plan for the area by the Town Planning authority, being tantamount to a change in Government policy, is a ground of discharge as it introduced new and unexpected conditions and restrictions which affected the original layout plan annexed to the agreement. Ordering the appellant to agree to a new layout plan as submitted by the respondent is tantamount to rewriting the agreement.

**[43]** The parties entered into the agreement which depended upon a possible approval for conversion and subdivision to be forthcoming from the PTG based upon the original layout plan. That application was rejected. Upon that happening, the agreement has to be regarded as dissolved by reason of circumstances beyond the control of the parties. The foundation

upon what the parties have deemed to have had in contemplation had dissipated when the application for conversion and subdivision was rejected. This would be a ground on which to rest the doctrine of frustration.

**[44]** It is not disputed that the PTG rejected the appellant's application for conversion and subdivision on 5 February 1990. His appeal to the PTG was also rejected. His appeal to the Menteri Besar met a similar fate. The appellant's duty under the agreement was to obtain conversion and subdivision of Lot 129. That application was rejected. He has performed by doing all that was required of him. We are of the view that the parties intended to perform only if the approval for conversion and subdivision was obtained. The original layout plan annexed to the agreement formed an integral part of the agreement and cannot be severed. The agreement was that the conversion and subdivision will have to be based on the original layout plan and not a revised or amended version of it unless both parties consent. The PTG had rejected the application for conversion and subdivision based on the original layout plan. The respondent cannot on its own volition vis-a-vis the appellant now insist on a revised or amended layout plan to be submitted. The Master Layout Plan, the effect of which would amount to a change in policy is the supervening event which had frustrated the agreement.

**[45]** We also noted that the following order of the learned trial judge in allowing the respondent's application as per encl 132 in the 1973 suit laid emphasis on the original layout plan annexed to the agreement; it reads, inter alia:

> IT IS HEREBY ORDERED that:
>
> (f) The plaintiff do execute Memorandum of Transfer in respect of the building lots comprised in the said Lot 129 in favour of the defendant and/or its agents being the defendant's entitlement in the said Lot 129 save and except for 2 Lots in the said Lot 129 which is the plaintiff's entitlement in the said Lot 129 *as per the terms of the Sale And Purchase Agreement dated 12 November 1971 and in accordance with the layout plan therein annexed* and deposit the same with the defendant's solicitors within seven (7) days from the date of being requested to do so by the defendant and/or its agents.

**[46]** Thus, what was required of the appellant in relation to the above is that he is to execute memorandum of transfers in respect of the building lots in Lot 129 in favour of the respondent, except for two lots which is his entitlement, as per the terms of the agreement and *in accordance with the layout plan annexed to the agreement.* Further evidence adduced before us at these appeals showed that the EXCO allowed the conversion of Lot 129 in principle subject to several conditions relating to low-cost and medium-cost houses and quotas on sale of the buildings to Bumiputras. Pursuant to that approval in principle, the respondent prepared a revised layout plan which clearly differed from the original layout plan, eg, under the original layout plan only 114 building lots comprising of terrace houses and bungalows were agreed to by the parties whereas the revised layout plan prepared by the respondent was varied to include 315 building lots comprising of shop lots, bungalow lots, terrace houses and town houses. We are of the view that the parties were in a position to foresee the possibility that the PTG may

request that the original layout plan be revised to conform to town planning requirements but yet made no provision for it in the agreement.

**[47]** We are of the view this is a proper case for the doctrine of frustration to apply. The necessary facts have been established to found a claim that the agreement has been frustrated. We hold that the agreement was frustrated when the PTG rejected the application on 5 February 1990. We accordingly allow these appeals with costs here and in the court below, set aside the orders of the learned trial judge granted in encl 132 of the 1973 suit and allow, with costs, the orders applied for by the appellant in OS No 24-523-97, namely, that the agreement so far as it relates to Lot 129 is frustrated and that the respondent surrender vacant possession of the said Lot 129. We also order that the deposit lodged in court by way of security is to be refunded to the appellant.

*Appeals allowed with costs.*

Reported by Mariette Peters Goh